IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TASER INTERNATIONAL, INC., *et al.* Plaintiffs, v. MORGAN STANLEY & CO., INC., *et al.* Defendants.	CIVIL ACTION NUMBER: 1:10-CV-03108-JOF

DEFENDANT BANC OF AMERICA SECURITIES LLC'S OPPOSITION TO PLAINTIFFS' MOTION FOR SANCTIONS FOR VIOLATION OF THE COURT'S JULY 16, 2009 SCHEDULING ORDER

Defendant Banc of America Securities LLC ("BAS") submits this memorandum in opposition to Plaintiffs' Motion for Sanctions Against Banc of America Securities LLC for Undisputed Violation of the Court's July 16, 2009 Scheduling Order (the "Motion").

PRELIMINARY STATEMENT

Plaintiffs again demonstrate with this motion that they seek to elevate every routine discovery dispute into a violation of a court order obviating the need for a meet-and-confer and warranting sanctions. This tactic places an undue burden on

the Court and forces BAS to expend resources responding to unnecessary motions. Indeed, before bringing this motion for a discovery extension, Plaintiffs did not even bother to ask BAS to consent. If they had, the parties could have worked toward a mutually agreeable solution to a relatively minor problem and avoided yet another sanctions motion. But Plaintiffs continue to shun this reasonable approach to discovery and instead insist on judicial intervention on issues that would ordinarily be resolved among experienced counsel in a complex litigation like this.

The purported violation at issue in the Motion is the inadvertent exclusion of data from the Daily Stock Record that BAS produced to Plaintiffs. The Daily Stock Record is a report BAS maintains to track the movement of all securities by or within the firm. In response to Plaintiffs' discovery requests, BAS attempted to isolate the entries on this report relating to TASER securities during a six-and-a-half-year period. This was an extremely time-consuming and burdensome process that took several months to complete and required writing a proprietary computer script and performing manual redactions. BAS ultimately produced more than 4600 pages of the report on September 14, 2009 and November 13, 2009.

On July 20, 2010—***more than eight months after receiving the data***—Plaintiffs informed BAS for the first time that the Daily Stock Record appeared to be missing portions of data on certain dates. BAS quickly investigated the issue

and concluded within a few weeks that some entries had been inadvertently excluded as a result of a computer programming error. BAS promised to resolve the issue as quickly as possible and went to extraordinary lengths to do so, including hiring a team of contractors to cull through more than eighty million pages of data. BAS corrected the issue a little over a month later, producing an updated version of the Daily Stock Record containing the previously-excluded data.

Plaintiffs allege that this inadvertent and promptly corrected error constitutes a violation of this Court's scheduling order because the order required BAS to produce the Daily Stock Record in September 2009. Plaintiffs further contend that this error was so severe as to warrant sanctions. But Plaintiffs do not explain how a two-month delay in receiving the corrected data caused them harm, especially given that Plaintiffs had the data eight months before bringing the error to BAS's attention. Nonetheless, BAS would be amenable to a brief discovery extension if Plaintiffs were to establish actual prejudice from the delayed production and agree to limit discovery in the extension period to issues arising directly from their review of the newly produced data. Plaintiffs' conclusory allegations of harm, however, cannot justify such an extension. It is undisputed that Plaintiffs have more than seven months remaining to review and analyze the data, and they have

made no showing that this is insufficient. Accordingly, Plaintiffs' motion for sanctions should be denied.

ARGUMENT

I. The Exclusion of Data from the Daily Stock Record Was Inadvertent and Resulted From a Computer Programming Error.

Early in this litigation, Plaintiffs requested and BAS agreed to produce those portions of the Daily Stock Record relating to TASER securities. The Daily Stock Record is voluminous—the six-and-a-half-years at issue in this litigation comprised more than 120 gigabits of text data, or the equivalent of more than 81 million pages.[1] (*See* Affidavit of Keba Vaughn, dated October 8, 2010 ("Vaughn Aff."), attached hereto as Ex. A, ¶ 7.[2])

Isolating the portion of the Daily Stock Record that relates to TASER or any other individual security is not an easy task. BAS's Global Content Archive group held a meeting on June 24, 2009 to determine how to approach this request and settled on writing a computer script to extract the relevant data. (*See* Affidavit of

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[1] LexisNexis estimates that a gigabyte of text data equals approximately 678,000 pages. *See* http://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_FS_PagesInAGigabyte.pdf.

[2] The Vaughn and Kerr affidavits were sworn to under the state-court caption of this case.

Bill Kerr, dated September 20, 2010 ("Kerr Aff."), attached hereto as Ex. B, ¶ 2-3.) The script was designed to open each daily report, search for the word "TASER," and then export the six pages that immediately followed. (*Id.* at ¶ 4.) After this script was completed and tested, it was executed on all Daily Stock Records for the relevant six-and-a-half-year period. (Vaughn Aff. ¶ 2.) The culled data was then manually redacted over the course of several weeks to remove those portions that related to other securities. (*Id.* at ¶ 3.) The resulting TASER-specific data was produced to Plaintiffs on September 14, 2009 and November 13, 2009. (*See* Affidavit of Brad Elias, dated October 8, 2010 ("Elias Aff."), attached hereto as Ex. C, ¶ 2.)

BAS had no knowledge that this data was incomplete until Plaintiffs identified a potential problem on July 20, 2010—more than eight months after first receiving the data. (*Id.* at ¶ 3; Kerr Aff. ¶ 5.) BAS investigated the issue and concluded on August 9, 2010, that certain entries on the Daily Stock Record had been inadvertently excluded as a result of an error in the computer script. (Vaughn Aff. ¶ 5.) While the script exported the six pages of data following the appearance of the text string "TASER," there were certain trading days on which the TASER-specific data on the Daily Stock Record extended beyond six pages. In these

instances, certain TASER stock movements were inadvertently excluded from BAS's production. (*Id.* at ¶ 5.)

BAS told Plaintiffs that it would work to resolve this newly discovered problem as quickly as possible. BAS was not able to provide a date certain for production given the quantity of data and the difficulty of isolating the TASER-specific portions. (*Id.* ¶ 6.) But BAS went to extraordinary lengths to produce the data as quickly as possible. In fact, it hired a team of outside contractors to review the 120 gigabytes of text data and manually extract the TASER-specific entries. (Elias Aff. ¶ 4.) On September 20, 2010, approximately 60 days after the error was first reported, BAS produced an updated version of the Daily Stock Record containing the previously excluded data. (*Id.* ¶ 5.)

II. Discovery Should Not Be Extended Because Plaintiffs Fail to Establish Any Prejudice From the Production Delay.

BAS does not believe that its inadvertent exclusion of data constituted a violation of the Court's July 16, 2009 Scheduling Order because BAS produced the Daily Stock Record in the time required. The single case Plaintiffs cite, *Riches To Rags, Inc. v. McAlexander & Assocs., Inc.*, 249 Ga. App. 649, 653 (2001), does not stand for the proposition that inadvertent computer problems may not excuse discovery errors. To the contrary, in *Riches to Rags*, the court found that the party responding to discovery "engaged in dilatory tactics and intentionally failed to

provide requested information in a timely manner" and "was intentionally prolonging the discovery process." *Id.* at 653. Plaintiffs here do not even allege that BAS intentionally withheld data or intentionally delayed the discovery process.

Nonetheless, BAS acknowledges that Plaintiffs were delayed in receiving portions of the Daily Stock Record. BAS would therefore consent to a brief discovery extension if Plaintiffs were to establish that they were prejudiced by this delay and agree to limit discovery during the extension period to issues arising directly from their review of the newly produced data. Plaintiffs, however, have offered nothing more than a conclusory allegation of harm based on the assertion that they now have seven more months, rather than nine more months, to review the Daily Stock Record. This assertion is insufficient to establish prejudice.

Plaintiffs have submitted no evidence demonstrating how long it will take to review and analyze the data. Without such evidence, the Court has no way to determine whether a discovery extension is necessary or appropriate. Indeed, there is no reason to believe that it will take Plaintiffs anywhere near seven months to review BAS's data since BAS was a small player in the prime brokerage market and has significantly fewer trading records than other defendants. *See* Seventh

Amended Complaint, ¶ 64 (alleging that BAS is the smallest prime broker in this action with a 2% market share).

III. Sanctions Are Unwarranted Because Plaintiffs Failed to Meet and Confer With BAS And Burdened the Court with Yet Another Unnecessary Motion.

This is a complex litigation in which the parties have produced tens of millions of pages of documents. Whenever there are document productions of this size and scope mistakes are bound to happen, and the parties generally work together to resolve these issues without judicial intervention. Plaintiffs, however, have repeatedly shown that they are unwilling to work with the Defendants to solve these types of problems. Rather, Plaintiffs have chosen to file sanctions motions with a frequency that none of the experienced defense counsel in this litigation have seen before. Indeed, Plaintiffs never asked BAS to consent to a discovery extension before filing their motion. (Elias Aff. ¶ 6.)

Plaintiffs justify their decision not to meet and confer by asserting that Georgia law does not require a conferral where there is an alleged violation of a court order.[3] Plaintiffs further assert that because a court order set a deadline to

[3] For example, Plaintiffs did not meet and confer with Merrill Lynch before filing a sanctions motion in connection with Merrill Lynch's alleged failure to make rolling productions. (*See* Plaintiffs' Reply Memorandum in Support of Their Motion for Relief and Sanctions for Violations of this Court's Discovery Orders, dated July 14, 2010, at 14 ("Defendants complain that

produce the Daily Stock Record BAS violated that order by making a timely, but inadvertently flawed, production of the data. Plaintiffs' position on this issue creates an inefficient discovery process and unnecessarily burdens the Court. If Plaintiffs had approached BAS with their concerns, BAS would have been willing to consent to a brief discovery extension conditioned on (i) Plaintiffs ability to show prejudice from the delayed production and (ii) Plaintiffs' agreement to limit discovery during the extension period to issues arising from their review of the Daily Stock Record. But BAS was never given this opportunity. Rather, Plaintiffs have forced BAS to brief what is, in the context of this litigation as a whole, an exceedingly minor issue that should not have required motion practice. Accordingly, Plaintiffs should not be rewarded by recovering fees and expenses that are purely of their own making.

Plaintiffs did not confer with respect to Defendants' violation of this Court's Order. But, where a party fails to produce documents in compliance with a court-imposed deadline, Uniform Superior Court Rule 6.4 does not require a meet-and-confer.").)

CONCLUSION

For all of the foregoing reasons, BAS respectfully requests that the Court deny Plaintiffs' motion for sanctions.

Dated: October 19, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2010, I have caused to be served a copy of the foregoing **DEFENDANT BANC OF AMERICA SECURITIES LLC'S OPPOSITION TO PLAINTIFFS' MOTION FOR SANCTIONS FOR VIOLATION OF THE COURT'S JULY 16, 2009 SCHEDULING ORDER** with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

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